United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/affidavit of mailing

75-1036

To be argued by
SAMUEL H. DAWSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1036

UNITED STATES OF AMERICA,

Appellee,

—against—

MANUEL GONZALEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
SAMUEL H. DAWSON,
Assistant United States Attorneys,
Of Counsel.

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1036

UNITED STATES OF AMERICA,

Appellee,

—against—

MANUEL GONZALEZ,

Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Appellant Manuel Gonzalez appeals from a judgment of conviction entered on January 3, 1975 after a jury trial in the United States District Court for the Eastern District of New York (Neaher, *J.*), which judgment convicted appellant of smuggling approximately four pounds of cocaine into the United States (Count Four) and of conspiring to do so (Count One) in violation of Title 21, United States Code, Sections 952(a) and 963 and Title 18, United States Code, Section 2.*

* This was appellant's second trial. His first trial resulted in a conviction which was later reversed by this Court. *United States* v. *Gonzalez*, 488 F.2d 833 (2d Cir. 1973).

The seven count indictment originally filed against the appellant and three co-defendants charged the importation, possession and distribution of the cocaine (Counts Four through Seven) as well as related conspiracies (Counts One through Three). At the conclusion of the testimony at that first trial the District Court dismissed Counts Two, Three, Five, Six and Seven.

Appellant was sentenced to five years imprisonment on each count, pursuant to Title 18, United States Code, Section 4208(a)(2), the sentences to run concurrently, and to be followed by a ten year special parole term.* Appellant is free on bail pending this appeal.

On this appeal, appellant Gonzalez understandably does not challenge the sufficiency of the evidence against him, but rather claims (1) that a single question asked of him during cross-examination by the prosecution was improper; and (2) that the order of the first trial court denying his application to depose a foreign national, which order was vacated by the second trial court, deprived his defense of essential testimony.

Statement of Facts

A. The Government's Case.

The Government's evidence at the second trial was substantially similar to the evidence it offered at the first trial. A summary of that evidence was set out by Judge Smith in the opinion of this Court when appellant's first conviction was reviewed:

> The principals of this case first came to the attention of the authorities when on October 7, 1972, Jose Valenzuela-Correa, a sixty-three year old Chilean national, was searched following his arrival in the United States from Chile at John F. Kennedy International Airport in Queens, New York. He was found to have over four pounds of cocaine strapped to his legs.[**] Correa agreed to cooperate with the au-

---

* Appellant was sentenced upon that first conviction to a ten year term of imprisonment to be followed by a five year special parole term.

** Jose Valenzuela-Correa pleaded guilty to Count Three prior to appellant's first trial. After testifying at that trial on behalf

[Footnote continued on following page]

thorities and stated that he was an intermediary between Mario Cerda, a business acquaintance of Correa's in Santiago, and a Mr. Gonzalez, whose address was 1511 Westchester Avenue, Bronx, New York. Correa stated that Cerda had given him an envelope which Correa was to give to Gonzalez along with the drugs. Upon inspection the letter[*] was found to be a letter of introduction, referring to Correa as "the bearer of your order." It also spoke of future orders but did not identify any of these "orders" as involving narcotics. The envelope also contained the

---

of the Government, Correa was sentenced to three years imprisonment, with five months of that term to be served, followed by a ten year special parole term. Correa was thereafter deported to Chile. At appellant's second trial Correa returned to the United States and again testified for the Government.

* The letter, typed in Spanish, was translated as follows:

Mr. Gonzalez, esteemed remembered friend, I hope that when you receive this you are well and enjoying good health.

Friend Gonzalez, the bearer of this letter is my uncle Jose Valenzuela, who I am introducing to you and hope that you may know to take care of him with your customary gentleness.

My uncle is the bearer of your order and since he must continue on to Miami to a meeting, I am requesting you send him on his way as soon as possible. He will not be able to stay in New York more than five days.

Friend Gonzalez, your order is a very good quality and you will have to make a good profit. The fact is that because of the raises nowadays in our country of freightage and things, there is eleven for each order. It will be appreciated if you give my uncle everything in big denominations as you will understand.

Friend Gonzalez, the next order will be twelve for each one and will be at the end of October or beginning of November with two orders, but you must answer me with some lines of whether you accept the situation of twelve per order. In any case, my uncle will give you the explanations.

As always, your friend Mario. (Government Exhibit 8).

halves of two different dollar bills cut in a zig-zag manner. Correa told customs officials that Cerda had instructed him not to deliver the drugs until he was shown the corresponding halves of the bills and that Cerda told him that Gonzalez would give him $300 in expense money at their initial meeting.

Correa's subsequent meeting with appellant Gonzalez on the night of October 7, at a bar owned by Gonzalez at the Westchester Avenue address, was under surveillance by special agents. The officers observed Gonzalez greet Correa, look briefly at the letter Correa gave him, and walk to the rear of the bar where Gonzalez disappeared from view. A short time later, an agent who pretended to be using the bathroom saw appellant speaking with a black man and giving him a sum of money. Gonzalez then stood in the rear of the bar, apparently reading from a piece of paper. Appellant next returned to Correa and gave him the matching halves of the bills contained in the envelope. Correa testified that Gonzalez then advised him that an individual would pick up the cocaine the next day at Correa's room in the Yonkers Motor Inn. Correa asked Gonzalez for the expense money, and Gonzalez gave him $300. The surveilling agents testified to all the above, except the conversation between Correa and Gonzalez.

The first arrest in this case was made when Bolivar Irizarry came to Correa's room the next day. Irizarry showed Correa the same halves of the bills that Correa had given Gonzalez the day before and also presented to Correa a Yonkers Motor Inn card that Correa had given Gonzalez. When Irizarry began examining the cocaine, the special agents emerged from the bathroom and placed him under arrest.[*]

---

* Irizarry pleaded guilty to conspiracy prior to the first trial and was later sentenced to eight years imprisonment. Subsequently,

[Footnote continued on following page]

> Appellant Gonzalez was arrested outside his bar later that day. Mario Cerda was named in the indictment as "John Doe, also known as Mario C." (488 F.2d at 834-835).

B. The Defense Case.

With several modifications that are noted hereinafter, appellant presented the same factual defense as he had at the first trial. The essence of that defense was previously summarized by this Court as follows:

> The defense claimed that Gonzalez believed the transaction involved shoes, not cocaine. Appellant testified in his own behalf that in February, 1972, he and Mario Mena Flores, a Chilean national who frequented Gonzalez' bar, had agreed to begin marketing in New York shoes which Flores made in Chile. Gonzalez and Flores further agreed that one Ricardo Gonzalez, apparently no relation of appellant's, was to be a partner in the venture and that Flores would send a shipment of shoes to New York as a sample. Appellant testified that Ricardo Gonzalez told appellant one week before Correa's arrival in New York that Flores would soon arrive in New York. Appellant contended that Correa introduced himself as being sent by "Mario," whom appellant took to be Mario Flores, that appellant showed the letter Correa gave him to Ricardo Gonzalez when appellant went to the rear of the bar and that Ricardo Gonzalez gave appellant the two halves of the dollar bills, telling him that they belonged to Correa. Appellant also testified that he gave Correa's motel card to Ricardo Gonzalez who said that he would pick up the shoes. Appellant denied

---

on appeal to this Court from a denial of his motion pursuant to 28 U.S.C. § 2255, Irizarry's plea was vacated. *Irizarry* v. *United States*, 508 F.2d 960 (2d Cir. 1975).

having discussed narcotics with Correa and stated that he had not seen Ricardo Gonzalez since the night of October 7, although he had tried resourcefully to contact him (488 F.2d at 835).

Appellant sought to bolster the defense presented at the first trial by introducing the testimony of Bolivar Irizarry and Dr. Stefan Miller. Dr. Miller testified that he first examined Gonzalez' eyes on June 6, 1969 and then again on July 6, 1970. However, Miller did not see Gonzalez again until November 9, 1972 approximately a month after Gonzalez' arrest (981-982).* It was Dr. Miller's opinion that given the condition of appellant's eyes Gonzalez would not have been able to read the letter sent from Chile without his glasses (987). However, Dr. Miller did add that it would be easier for Gonzalez to read the letter under a spotlight (990). This fact eroded the optometric defense since an earlier defense witness stated that the appellant turned on a spotlight in the rear of the bar and, more importantly, Agent Spielsinger testified that appellant stood under that light for about a minute looking at the piece of paper (634-635, 769).

Bolivar Irizarry testified for the defense (899-965). He stated that he knew the appellant, having met him about ten times (900-901). As far as explaining how he came to appear at Correa's room at Yonkers Motor Inn, Irizarry swore that a man named "Joe" had given him the cut dollar bill halves, the Motor Inn card, instructions to pick up a package of unknown content and $100 to still his curiosity (910-912). Irizarry arrived at the Motor Inn and matched his dollar halves with Correa's. Irizarry began to examine the suitcase containing the cocaine at which point he was arrested (915). Finally, Irizarry noted that around the time this incident occurred he was a user of cocaine and a doer of "odd" jobs (940, 961).

---

* Page numbers in parenthesis refer to the transcript of trial.

There was a factual development at the second trial that did not occur at the first. As has been set forth above, appellant sought to establish Ricardo Gonzalez as a major figure in the case. Supposedly, Ricardo Gonzalez was the one who told appellant that the "shoes" had arrived from Chile and that he (Ricardo) would have them picked up from Correa at the Yonkers Motor Inn (1117, 1133). Interestingly, at the second trial, Matilde Gonzalez,* a waitress at appellant's lounge, was shown a photograph of Bolivar Irizarry (Exhibit 13) by Government counsel. She identified Irizarry as looking like the person she knew to be Ricardo Gonzalez (773).**

In any event, appellant does not question the sufficiency of the evidence and as this Court has previously indicated the evidence was abundant that he was engaged in a narcotics transaction (488 F.2d at 833, 835).

---

* Matilde Gonzalez is not related to the appellant (760).

** Counsel for appellant showed the same photograph of Irizarry to another defense witness, Anthony Cifre. Cifre said the photograph looked like Ricardo Gonzalez, a man that appellant had introduced to Cifre (888-889). However, when Cifre and Matilde Gonzalez were asked to look at Irizarry in the courtroom, after he had been identified by name as Irizarry, they both said he was not Ricardo Gonzalez (889-889a, 1024).

ARGUMENT

POINT I

The question asked by the prosecution was perfectly proper and asked in a proper manner.

Appellant claims that one question put to him during his lengthy cross-examination was improper. However, in light of the factual context in which the question was asked and for the several reasons discussed below, that single question complained of was fairly put and in all respects proper.

Appellant, as previously set out, sought to shift responsibility for his incriminating actions in the bar vis-a-vis Correa, by asserting that one Ricardo Gonzalez had apparently been manipulating him. Additionally, appellant claimed no contact whatsoever with Bolivar Irizarry, the man who showed up at the Motor Inn with the dollar halves and business card that had earlier been in appellant's possession. Two defense witnesses, Matilde Gonzalez and Antonio Cifre identified a photograph of Bolivar Irizarry as the man they knew, from working in and frequenting appellant's bar, to be Ricardo Gonzalez. Irizarry testified he knew the appellant, having met him ten times, and served him drinks on occasion at another bar (900-901). The appellant however, was quite equivocal in response to his own counsel's questioning as to his familiarity with Irizarry. At first Gonzalez denied knowing Irizarry (1137). He suggested to the jury that the first time he and Irizarry met was at Federal Detention Headquarters at West Street upon their arrest (1138). Finally, appellant allowed as how he might have "seen" Irizarry in the past but he had no recollection of it (1140). Therefore, in light of the earlier identification, and the defense generated conflict

between Irizarry and appellant as to their relationship, it became perfectly proper for the Government to attempt a brief inquiry into a possible tie-in between Gonzalez and Irizarry.

After appellant acknowledged ownership of a telephone address book, he was asked the following questions about it:

"Q. Does the name Irizarry appear in that telephone book under the I's?

A. Irizarry is a common name. There is a Tony Irizarry who owns a bar called La Bahia.

Q. Isn't he related to Bolivar Irizarry?

A. I don't know, but I never saw them together." (1A).*

Defense counsel requested a representation from the Government that Tony Irizarry and Bolivar Irizarry were related. Government counsel indicated that the information then available to him was that the Irizarrys were cousins and that Bolivar Irizarry obtained part time employment in a bar through his cousin.** Irizarry, it will be recalled, testified that he had served the appellant some drinks at a bar, the very bar where the so-called "Joe" gave him the dollar halves and the instructions to pick up the package of cocaine. Appellant in answer to a question immediately prior to the question complained of admitted that Tony Irizarry was a bar owner, though a different one from the one Bolivar had worked at.

---

* Page references are to the Government's Appendix.

** Mr. Dawson [prosecutor]: I have been told by one of the agents on the case who was pursuing some investigation regarding Irizarry—

Mr. Direnzo [defense counsel]: This Irizarry who testified?

Mr. Dawson: Yes. When they photostated the book, the defendant's address book, and the name Irizarry, Antonio Irizarry was there, they checked preliminary and they heard some word that he was a cousin of Antonio Irizarry and that is how he got employment in one of the bars.

* * * * *

I cannot say that I know for an *absolute* fact that Tony Irizarry is related but that was the information. (2A) (Emphasis supplied).

It is clear that from all of the prior testimony regarding Irizarry and his relationship to appellant, the attempt to establish some link between the two was wholly appropriate. The trial court quite correctly limited the inquiry into whether the Irizarrys were related by directing that further questioning along that line would be foreclosed if appellant said that they were not related. Notwithstanding the court's permission to proceed, Government counsel asked no further questions in that area.

While a question to a witness should not assume an unsubstantiated fact, absolute substantiation is not required.* To require absolute certainty would create the anomalous situation wherein the prosecution could prove guilt merely beyond a reasonable doubt but must prove the factual basis for its questions beyond all doubt whatsoever. Absent a showing of an abuse of discretion going to the very heart of the trial, the trial court's ruling regarding the quality or quantity of substantiation should be upheld. Indeed the alternative holding by this Court in *United States* v. *La Sorsa*, 480 F.2d 522, 529 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973), was to the effect that even if the trial court's ruling was incorrect the entire record should be reviewed to determine whether or not the defense was unduly prejudiced. In any event, there was a sufficient showing by counsel as to the factual predicate for the question in issue, particularly when that showing is linked to the earlier efforts of appellant to deny knowledge of

---

* Appellant cites Standard 5.7(d) of the ABA Standards Relating to the Prosecution Function in support of the principle that it is improper,

> ". . . to ask a question which implies the existence of a factual predicate which the examiner *cannot* support by evidence. (Appellant's Brief, p. 13) (Emphasis Supplied).

Upon closer examination we find the section referred to cautions against questions that imply a factual predicate *and* that the examiner *knows* he cannot support by evidence (emphasis supplied).

Bolivar Irizarry and his witnesses identification of Irizarry as Ricardo Gonzalez.* The trial court properly safeguarded the jury against any possible innuendo, however unintended it might have been when it instructed the jury to disregard the question asked.**

It is interesting to note that though the prosecution did not ask any further questions in this area and notwithstanding the court's curing instruction, defense counsel vigorously pursued the same matter on redirect examination of the appellant and again during his summation. Appellant on redirect categorically denied that the Irizarry in his telephone book was Bolivar Irizarry (9A). The Government never claimed otherwise. Appellant's counsel sought to turn the telephone book entry to appellant's best advantage. He argued effectively in summation first, that the book contained the name of "a completely different Irizarry" and secondly, that it strained common sense to believe that appellant would keep on his person any evidence that might tie him to the drugs and the other co-defendants (10A-11A). Finally, counsel repeated the court's earlier admonition to disregard the question (11A-12A).

Appellant's reliance upon *United States* v. *Landers*, 484 F.2d 93 (5th Cir. 1973), *cert. denied*, 415 U.S. 924 (1974); *United States* v. *Mullins*, 487 F.2d 581 (8th Cir. 1973) is misplaced since those cases are clearly distinguishable from

---

* The fact that the witnesses subsequently denied that Irizzary was Ricardo when, after his being identified to them by name he was exhibited to them, only underscores the credibility conflicts that juries are required to resolve.

** The instruction was:

> "Members of the jury, you may have heard some questions about relationships. By agreement of counsel I am instructing you to disregard that testimony with regard to a relationship. Do you understand?" (12A).

Previously the court instructed the jury in another context that:

> "I guess it is time again to remind you that statements of fact contained in questions are not evidence. What matters here as evidence is what you hear the witnesses say and only that." (783-784).

the matter *sub judice*. In *Landers*, during cross-examination of a Government witness, defense counsel suggested that the witness was changing his "story" as part of a deal with the Government. The trial court in *Landers* took issue with the *form* but not the subject matter of the question. The conclusion about a "deal" had no support in the record, and while counsel was free to explore that question he chose to withdraw it. *Landers, supra*, 484 F.2d at 94-95. Moreover, the issue pressed on Landers' appeal was the alleged limitation the trial court imposed upon the scope of cross-examination by defense counsel. The Fifth Circuit in *Landers* recognized that the scope and form of questions propounded during trial are matters left to the wide discretion of the trial court. 484 F.2d at 95.

In *United States* v. *Mullins, supra,* the issue concerned the propriety of impeaching questions put to a defense character witness. While distinguishable on its factual setting and for the different policy concerns involved in character witness impeachment, the case is nevertheless instructive. There, as here, a similar course of action was followed. There was a demonstration as to the underlying predicate of the question, the Government subsequently withdrew the question, and the court adequately cautioned the jury. Finally, in *Mullins* the Court found that if any error was committed it was harmless.

Finally, if there was any error in the phraseology of the one question complained of it surely was of the harmless variety. Rule 52(a), F.R.Cr.P. The error was not repeated, and the curing instruction was prompt and strong. Since there was an abundance of evidence concerning appellant's guilt (488 F.2d at 833, 835), and the result would almost surely have been the same despite the solitary question, the asserted error, if any, should be disregarded.* It is not

---

* As Judge Medina has recently noted:

"At times, especially in criminal cases, an utterly insigni-

[Footnote continued on following page]

unreasonable to assume that in this relatively simple case the jury followed the court's instruction (*United States* v. *Catino*, 403 F.2d 491, 496 (2d Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969)), and that this question which covered less than half a page in a transcript of over 1300 pages was harmless in all respects.

POINT II

The initial denial of appellant's motion to depose a foreign witness was proper; upon the motion being subsequently granted, the appellant was afforded an ample opportunity to locate and depose the witness.

Appellant argues that Judge Costantino abused his discretion in refusing to order the deposition of a witness located abroad. Furthermore, he claims that upon remand of the case to Judge Neaher for retrial, the subsequent granting of the order was to no avail since by that time the witness could no longer be found. As a result, it is said "important" testimony was lost to the defense.

This Court has previously summarized the nature and context of this expected testimony as well as the basis for Judge Costantino's denial of the motion to dispose.

> "Shortly after his arraignment appellant made a motion pursuant to Rule 15(a) [*] to take the deposi-

---

ficant colloquy is blown up to make it look like a legitimate point for reversal." *United States* v. *Brown*, — F.2d — (2d Cir. Slip Opinion, 1847, 1855, February 20, 1975).

* Rule 15(a) states in relevant part:

If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent failure of justice,

[Footnote continued on following page]

> tion abroad of 'Mario Menna.' As noted, appellant has contended throughout that he, Ricardo Gonzalez, Mario Menna Flores were engaged in a retail shoe venture. In affidavits in support of his Rule 15(a) motion appellant stated that 'Menna' was Mario Mena Flores and that Flores was willing to be deposed but unwilling to travel to the United States to testify. Appellant's affidavits further stated that Flores had told defense counsel in Chile that Flores and appellant were planning a retail shoe business, that Flores had given Correa a letter of introduction to appellant, but not the one that later was introduced at trial. Judge Costantino denied appellant's motion, stating that Flores was not unable to attend trial or prevented from attending but that Flores was unwilling to attend because he did not want to expose himself to criminal liability since it was most probable that he was the co-defendant in this case 'John Doe, also known as Mario C.'" 488 F.2d at 838.

This Court further noted that there was substantial evidence indicating that Mario Mena Flores was the co-defendant "Mario C." and in a sense a fugitive from Justice. 488 F.2d at 839.*

Since it was not central to this Court's decision on appellant's first appeal, this Court did not definitely pass on the validity of Judge Costantino's order denying appellant's motion to depose a foreign witness. However, this Court indicated that since the matter is one confined to the discre-

---

> the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

* Appellant identified Flores as a "witness also joined herein as a defendant" in appellant's motion papers submitted to Judge Costantino. 488 F.2d at 839.

tion of the trial court, Judge Costantino probably acted within the scope of that discretion. *United States* v. *Soblen*, 203 F. Supp. 542 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962). Since there was to be a new trial in any event, this Court expressed the belief that a "wiser course" would have been to grant the application (*United States* v. *Hayutin*, 398 F.2d 944, 954 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968), and leave to the jury the worth to be attached to the deposition. 488 F.2d at 839.

Appellant at his first trial failed to demonstrate by even a minimal factual showing that the foreign witness was unable to attend and testify in the United States. Such a demonstration is the initial requirement of Rule 15. No doubt this failure underscored the suspicion that Flores was in fact the co-defendant "Mario C." The preponderance of judicial authority clearly requires some factual support for a claimed "inability to attend." It has been held that in the absence of any factual elaboration that the witness, *in fact*, could not be present, Rule 15(a) could not be satisfied. *United States* v. *Rosenstein*, 303 F. Supp. 210, 212 (S.D.N.Y. 1969). Similar motions have been denied for failure to submit some factual basis implying that the prospective witness might be unable to attend. *United States* v. *Rickenbacker*, 27 F.R.D. 485, 486 (S.D.N.Y. 1961); *United States* v. *Birrell*, 276 F. Supp. 798, 822 (S.D.N.Y. 1967); *United States* v. *Massi*, 277 F. Supp. 371, 374 (D.C. Ark. 1968).

Upon the remand in this case the District Court granted appellant's motion and allowed Gonzalez over eight months to find and depose the witness. During that period appellant apparently made some efforts through Chilean counsel to locate Flores (Appellant's Appendix, pp. 62a-65a). Appellant has conceded on numerous occasions that the Government attempted to assist in the search for Flores by utilizing the aid of American agents located in Chile and by employing the good offices of American Embassy personnel located in Santiago (Government Appendix, pp. 29A-

30A). Neither side's efforts bore fruit, nor was there the slightest prospect of any lead developing. The trial court faced with either an indefinite postponement or proceeding to trial, chose the latter course.

While appellant may have desired to have Flores' very suspect, though "exculpating" testimony placed before the jury, he achieved that very result by other means. Appellant himself testified fully as to his arrangements and understanding with Flores regarding the shoe venture. Additionally, appellant produced ample evidence which, if believed, would have given credence to his version of the events. Appellant offered the testimony of Howard Fishman the landlord of his bar to tell how appellant discussed with him plans for an imported shoe retailing enterprise to be based in one of Fishman's properties (794). Anthony Cifre testified that he overheard appellant and another discuss the shoe business and the desirability of locating it in Jackson Heights, Queens (884-885). Finally, appellant introduced into evidence a number of invoices that indicated that sometime after his arrest appellant was sent a package of shoes by Flores from Chile (1259). The very essence then of Gonzalez' defense was before the jury. It was more than appellant's mere singular version of the events.

His testimony was bolstered by that of other witnesses who had no apparent motive to lie, and by certain documents relating to shoes. It is hard to imagine how Flores' deposition could have tipped the scales in appellant's favor. Some regard must be had for the common sense verdict of twenty-four jurors who could have fully credited appellant "shoe business" explanation but also believed that he was engaged in the business of importing drugs as well.

The appellant refuses to come to grips with the fact Flores was unwilling, not unable to submit himself to the jurisdiction of a United States District Court. Appellant's analogy, drawn from the decision in *United States* v. *Mosca*,

475 F.2d 1052, 1058-1068 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973) is wholly inappropriate. Neither the Government nor the District Court stood in Flores' way had he desired to appear and testify on appellant's behalf. The court below was more than generous in extending to appellant an eight month delay of trial in order to find a witness.* No claim has ever been raised that the Government did not earnestly seek to locate Flores. For reasons best known only to Flores, he put a continent and an ocean between himself and an enforceable oath. If this Court reverses the conviction herein and remands for a third trial there is no guarantee at all that Flores will ever be found. To allow the actions of an "unwilling" foreign witness to so manipulate the result in this or any other case is to allow our system of justice to be rendered virtually impotent. While Rule 15 was designed to assist an accused, it was never intended as a means to forestall the very rendering of justice.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: April 16, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
SAMUEL H. DAWSON,
Assistant United States Attorneys,
Of Counsel.

---

* According to appellant's Chilean counsel, Flores had abandoned his wife and was driving a taxi cab somewhere in Chile. Appellant's Appendix, pp. 62a-65a.

★ U. S. Government Printing Office 1975— 614—249—98

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 16th day of April 1975 he served ~~a copy~~ two copies of the within

Brief for Appellee

by placing the same in a properly postpaid franked envelope addressed to:

H. Elliot Wales, Esq.
747 Third Avenue
New York, N. Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez

LYDIA FERNANDEZ

Sworn to before me this

16th day of April 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4601905
Qualified in Kings County